No. 94-301

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

James Kevin Craig, *Petitioner,*

v.

State Bar of California, *Respondent.*

To Petition for a Writ of Certiorari
to the Supreme Court of
the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

May California, without violating petitioner's First Amendment free exercise of religion rights, require that petitioner, as a condition of being admitted to practice law, swear or affirm that as an attorney he will support the federal and state constitutions; or does petitioner have a "free exercise" right to substitute for such secular oath, a theocratic Christian oath affirming his supra-national loyalty to the authority of God and the Christian Scriptures.

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STATEMENT

Petitioner James Kevin Craig is an applicant for admission to practice law in California who passed the bar examination but who was denied admission because he refused to take an oath to support the Constitution of the United States and the Constitution of the State of California, as required by California Business and Professions Code section 6067.[1] (Petition for Writ of

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[1]Cal. Bus. & Prof. Code section 6067 provides:

> Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license. (Original version at Cal. Code Civ. Proc. §278, amended Cal. Code Am. 1880, ch. 34, §1, p. 56.)

The language of the oath in dispute here

Certiorari ["Petition"], Appendixes A, B and C.)

In petitioner's view, an oath[2] is

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is contained in an "oath card" that an applicant must execute and return to the State Bar of California. A copy of the oath card is set forth in the appendix to this brief.

Petitioner did not object to taking that part of the oath that required him "faithfully to discharge the duties of any attorney to the best of his knowledge and ability."

[2]While Cal. Bus. & Prof. Code § 6067 itself does not specifically permit an "affirmation" in lieu of an oath, an affirmation is permitted (see appendix) and unquestionably is sufficient in California. See Cal. Const., art. XX, § 3, which specifies the oath of office for all state public officers and employees, executive, legislative and judicial, and permits an oath or affirmation. See also, accord, Cal. Govt. Code § 1360.

Affirmation of support in lieu of an oath is historically a neutral and permissible legislative accommodation of religious belief. See Board of Educ. of Kiryas Joel v. Grumet, ___ U.S. ___, 114 S.Ct. 2481, 2501 (1994) (Kennedy, J., concurring) and id. at 114 S.Ct. 2512. (Scalia, J., dissenting.)

part of religious worship, which can only be done in the "Name of God" and must be subordinated to the "Word of God." Petition, pp. 3, 6. Indeed, petitioner seems to assert that he has a First Amendment free exercise of religion right to substitute for the "Secular Humanist" support oath a theocratic Christian "test oath" of the type struck down by the Court in Torcaso v. Watkins, 367 U.S. 488 (1961). (See Petition, pp. 2-3, 6-9.) Consistent with this view, petitioner requested the California Supreme Court to issue its writ directing the Committee of Bar Examiners of the State Bar of California, as the court's administrative arm, to allow petitioner to be certified for admission on the taking of the following oath in lieu of the oath of constitutional support

required by section 6067:

> "I, A.B., do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testaments to be given by divine inspiration.
>
> I solemnly swear (or affirm) that I am dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government, and am committed to dissuading others from resorting to force or violence, that I am not loyal to any foreign State, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability."[3]

The California Supreme Court declined to order such a substitution

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[3]The language of the first paragraph of this proposed oath appears to have been taken from the early Delaware Oath quoted at p. 6 of the petition. See Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 469 (1892).

and this petition followed. (Petition, p. 1, and Appendixes B and C.)

REASONS FOR DENYING WRIT

It is not correct, as petitioner seems to imply, that this case involves a "loyalty oath" as distinguished from a forward-looking, promissory oath of constitutional support. (See Petition, p. 5.) Petitioner has not been questioned about his beliefs or associations in order to test his "loyalty" or the "good faith" with which he could take the support oath. Cf. Baird v. State Bar of Arizona, 401 U.S. 1, 4-8 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 161-167 (1971).

The premise of petitioner's argument for granting the writ – that the law in the area of "loyalty oaths" is confusing and unsettled (Petition,

p. 5) – is simply irrelevant, regardless of its truth. Nothing more or less is involved here than a simple, forward-looking oath of constitutional support of a type repeatedly upheld in the past. See, e.g., Cole v. Richardson, 405 U.S. 676, 680-686 (1972); Connell v. Higginbotham, 403 U.S. 207, 208 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 161-162; Knight v. Board of Regents, 269 F. Supp. 339, 340-342 (S.D.N.Y. 1967), aff'd per curiam, 390 U.S. 36 (1967). Neither is this the first time that the Court has considered and rejected a First Amendment "free exercise" of religion challenge to a support oath. See Biklen v. Board of Education, 333 F. Supp. 902, 905-908 (N.D.N.Y. 1971) (upholding constitutionality of New York law requiring teachers to take support

oath in face of First Amendment attack by teacher who contended that it violated her religious and conscientious beliefs as a Quaker), aff'd per curiam, 406 U.S. 951 (1972). Also unavailing is petitioner's argument that the support oath is unconstitutionally vague within the meaning of the due process clause. (Petition, p. 15.) See Ohlson v. Phillips, 304 F. Supp. 1152, 1154-1155 (D. Colo. 1969) (holding support oath not unconstitutionally vague or overbroad), aff'd per curiam, 397 U.S. 317 (1970); Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), aff'd per curiam, 390 U.S. 744 (same) (1967).

Petitioner also argues that there is no reason to require attorneys to take support oaths of the type required by the California Constitution, because attorneys are not legislative, executive

or judicial "officers." (Petition, pp. 16-17.) Nevertheless, as petitioner also recognizes, attorneys are often referred to as "officers of the court." See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Indeed, as Mr. Justice Marshall recognized in his dissent in Wadmond, 401 U.S. at 192: "The oath of constitutional support requires an individual assuming public responsibilities to affirm . . . that he will endeavor to perform his public duties lawfully." And as the Court noted in Goldfarb v. Virginia State Bar, 421 U.S. at 792: "The interest of states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice . . ." (See also Hoover v. Ronvin, 466 U.S. 558, 569, n. 18 (1984). That petitioner

as a self-described "anarchist" feels conscientiously unable to affirm support for the organic law of the nation and state does not make it any less constitutionally appropriate for the California Legislature to determine as a policy matter that an oath or affirmation of such support is a predicate for admission to practice law.

Finally, petitioner apparently suggests that the time has come to return to the past, to the period preceding Torcaso v. Watkins, when, for many years following the ratification of the U.S. Constitution, the states were permitted to require or allow oaths of public office that conformed to the tenets of Christianity. (Petition, pp. 2-3, 6.) As petitioner sees it, Torcaso v. Watkins ushered in an era of Secular Humanism, one in which the

"Nation-State" was enthroned as the "new god." (Petition, pp. 6-9, 12-13.) According to petitioner, such "secular nationalism" has become a dangerous anachronism in this modern era of "Global Interdependence," the "trans-national realities" of which suggest that 20th century fears of disloyalty can be replaced by a "global vision" for the 21st century. (Petition, pp. 16-18.)

It seems not unlikely that many would contest petitioner's view that the nations and peoples of the world have progressed to the point that "supra-national visions of social order" have eliminated the need for commitment to the preservation of the organic laws of our nation and state. Indeed, many might argue that even with the end of the cold war, there is still a degree of

racial, ethnic and religious conflict that makes the world a very unstable and dangerous place. See, e.g., Potential U.S. Enemies Amass High-Tech Arms, L.A. Times, Sept. 1, 1994, at A1. Moreover, even domestically, some might feel that calls for a return to "Christian theocracy" signal even greater need to preserve and protect all our basic constitutional freedoms, secular or not. In all events, it is submitted that the forward-looking, promissory oath of constitutional support required by section 6067 has not become a "meaningless formality"[4] as petitioner

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[4]In making this argument, petitioner focuses on the Court's reference in Cole v. Richardson, 405 U.S. at 685, to the Massachusetts's support oath there considered as "no more than an amenity." However, that appellation was used in response to an attack on the oath as void for vagueness, simply to indicate that the oath created neither specific

suggests; and that petitioner does not have a First Amendment "free exercise" right to substitute a "theocratic Christian oath" in its place.

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responsibilities nor triggered specific sanctions, other than prosecution for perjury involving a knowing and willful falsehood--in taking the oath. As the Court noted, far from being meaningless, the oath requires that persons in positions of public trust commit themselves to live by the constitutional processes of our system. (Id.) Since petitioner is unwilling or unable to make such a commitment, under California law he cannot be licensed as an attorney.

CONCLUSION

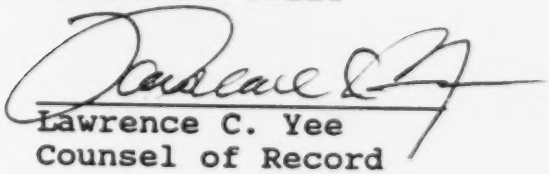
It is respectfully submitted that the oath of constitutional support required by California as a condition of admission to practice law is constitutional both on its face and as applied to petitioner, despite his religious beliefs to the contrary. That oath requires no more of petitioner than does the oath required by the Court of those seeking admission to its Bar. Sup. Ct. R. 5.4. The petition should be denied.

DATED: September 28, 1994

Respectfully submitted,

DIANE C. YU
LAWRENCE C. YEE
STARR BABCOCK

ROBERT M. SWEET



Lawrence C. Yee
Counsel of Record

APPENDIX

STATE BAR OF CALIFORNIA OATH CARD

I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability.

Dated: This _____ day of _____ 19_____

_____

COPY

I hereby certify that the foregoing oath, taken by the attorney above named, as required by law, was formally administered by and subscribed to before me

this _____ day of _____ 19_____

[seal]

_____